MOTION FILED
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No. 90-429

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION,
Petitioner,
v.
BETSY Y. JUSTUS, in her official capacity as Secretary of the North Carolina Department of Revenue,
Respondent.

On Petition for Writ of Certiorari to the North Carolina Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AND NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

National Rural Electric Cooperative Association and National Rural Utilities Cooperative Finance Corporation ("Movants"), through their respective undersigned counsel, hereby respectfully move the Court for leave to file the hereto-attached Brief as Amici Curiae in support of the Petitioner Four County Electric Membership Corporation; and as grounds herefor, Movants say unto the Court:

1. Movants caused one of the Petitioner's attorneys, on their behalf, to request the Respondent Secretary of the North Carolina Department of Revenue for her consent to the filing of the hereto-attached Brief. Through her attorney of record, Respondent refused to give such permission, citing grounds of personal pique with one of the Petitioner's attorneys. Movants do not believe the

Court for such reason should be deprived of what will be useful information in helping the Court decide how to act on the Petition.

2. As a reference to the hereto-attached Brief of Movants will verify, it is just that, brief, for the reason that it does not reargue the law of this case but seeks only to emphasize the substantiality of the question that is involved and why it is of national interest and importance that that question be reviewed and decided by the Court.

Respectfully submitted this 11th day of October, 1990.

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BRIEF OF AMICI CURIAE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AND NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION IN SUPPORT OF PETITIONER

INTERESTS OF THE AMICI CURIAE

The interests of the *amici curiae* in this appeal are, respectively, as follows:

National Rural Electric Cooperative Association (NRECA) is a District of Columbia cooperative trade-service organization representing virtually all of the nearly 1,000 electric cooperative and public utility district borrowers of the United States Rural Electrification Administration (REA). These borrowers include the Petitioner Four County Electric Membership Corporation (Four County).

Rural electric distribution cooperatives such as Four County are responsible for electric service in 70-75% of

the nation's total land area, including Alaska. Thus NRECA's interests—more importantly, the interests of NRECA's constituent member systems—are such as to compel a profound and sensitive concern for this proceeding.

* * * *

National Rural Utilities Cooperative Finance Corporation (CFC) is also a District of Columbia cooperative organization whose membership consists of nearly 1,050 of the nation's electric cooperatives and their affiliated organizations. These include the Petitioner Four County as well as all of the other 28 electric cooperatives domiciled in North Carolina. CFC provides its members with debt capital, either solely or supplementally to funds borrowed by them from REA. CFC is a nonprofit cooperative.

* * * *

The *amici*—and all of their constituencies, which include virtually all existing electrical entities financed by REA since its inception in 1936, see 7 U.S.C. Sections 901-950b (1980)—are directly or indirectly concerned with providing adequate, reliable electric service throughout rural areas in 46 of the 50 states, on a nonprofit basis and at the lowest cost consistent with sound business principles.

Consider certain relevant data[1] as of the end of 1986 for all REA borrowers:

—Long term loans outstanding (multi-billions had already been paid off):

Source	*Amount*
REA	$11.776 billion
REA-Guaranteed	$18.8 billion
Non-REA	$ 8.959 billion[2]
TOTAL	$39.535 billion

[1] These data are taken from 1989 Statistical Report, Rural Electric Borrowers, United States Department of Agriculture, Rural Electrification Administration, REA Bulletin Number 1-1.

[2] Most of this amount was provided by CFC.

—Total miles of electric line in place:	2,144,424
—Total consumers served:	11,421,035
—Average consumers per mile of line:	5.33

The foregoing data emphasize two cardinal facts that bear on this case:

First, the United States has engaged in a national program of rural electrification by virtue of which, through direct and guaranteed loans, it, as well as others, (primarily CFC), has invested—has loaned at considerable risk—an enormous amount of the nation's money.

And second, burdening the financial viability of the REA borrowers through imposition of taxes on equity capital not similarly imposed on investor-owned utilities impairs their ability to fulfill their federal- and state-established purposes of rendering good electrice service at reasonable rates on a nonprofit basis, impairs their ability to compete for new electric loads, and imposes punitive prices upon their member-consumers.

We submit that the foregoing amply demonstrate the substantial interest of these *amici curiae* in this proceeding.

SUMMARY OF ARGUMENT

We have read and carefully reviewed Four County's Petition. We hereby affirm the correctness of its Statement of the Question presented and of its Statement of the Case. We also hereby affirm and adopt as our own the argument advanced by the Petitioner—and the authorities in support thereof—to the effect that the North Carolina Court of Appeals and Supreme Court have allowed the involved North Carolina taxing statutes to so stand, or at least to be so interpreted and implemented, as to do violence to the Petitioner's rights under the Fourteenth Amendment to the United States Constitution.

We otherwise submit our argument solely in furtherance of the proposition that the national importance and substantiality of the question presented by the Petition are such as to deserve review and decision by this Court.

ARGUMENT

PETITIONER'S CAUSE INVOLVES A QUESTION OF NATIONAL IMPORTANCE AND SUBSTANTIALITY THE RESOLUTION OF WHICH WILL HAVE SIGNIFICANT FINANCIAL CONSEQUENCES IN MANY OF THE 46 STATES IN WHICH REA ELECTRIC COOPERATIVE BORROWERS OPERATE

Rural electric cooperatives, such as Four County and the other 28 electric cooperatives corporately sited and operating in North Carolina, operate—some 950 or so—in 46 states. All of them, as compared with the investor-owned and municipal electric utilities, furnish service in more sparsely settled areas of the country. With an average density of some 5.33 services per mile of electric lines (compared with 20-40 for their IOU and municipal counterparts), these cooperatives have been assigned, by both federal and state policy, the difficult task of extending and providing adequate and dependable electricity to those areas of the nation most costly to serve. Any revenue tax which arbitrarily and substantially increases those costs up to and above those paid by their IOU and municipal competing retail suppliers is surely suspect on Fourteenth Amendment grounds.

Twenty-two of the 46 states in which such cooperatives operate are imposing, to varying but significant degrees, some form of sales and/or gross receipts tax on these cooperatives' revenues from their consumer-members.[3] In all but two of these states (Indiana and Alabama—*see* Petition at page 13), no distinction is made so as to exclude from taxation that portion of sales receipts that constitutes patronage equity capital furnished to the cooperatives under a contracted obligation of the consumer-members so to do as provided in the cooperatives' bylaws.

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[3] Alabama, Alaska, Arizona, Arkansas, Florida, Idaho, Illinois, Indiana, Kentucky, Mississippi, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Virginia, Washington and Wisconsin.

Thus, hundreds of millions of dollars in revenues, annually, are affected by the same type of treatment to which North Carolina is subjecting the electric cooperatives operating within its borders. That a financial impairment of those cooperatives is thereby effectuated can hardly be disputed. But the fact that similar treatment is not accorded to the equity capital receipts of investor-owned utilities may—and certainly, as here, should—be challenged.

For many reasons known only too well by the Court, economic, social, political and, yes, even military and foreign affairs developments have caused electric power rates in general to suffer manifold increases over the past 20 years. We respectfully submit that any state policy, such as is being pursued here by North Carolina, ought to be considered by this Court if the clear and substantial effect of it is to impose unequal protection of the taxing laws. Not only does the federally initiated measures for electrification of the nation's vast hinterland command concern for such a state policy; basic notions of equity, fairness and justice cry out for it.

CONCLUSION

We are of course aware that the Court receives thousands of petitions for certiorari every year, and that it of necessity must deny most of them. Nonetheless, involving, as it does, a federally adopted and implemented objective and policy initiated over half a century ago, we must respectfully submit that Four County's Petition does indeed encompass substantial considerations of national concern, and that the prayed-for writ should therefore issue.

Respectfully submitted,

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